

CLIENT ALERT

Will the CJEU Uncap the Recovery of IP Litigator Fees?

Jan.30.2015

That question is on the minds of many European IP litigation stakeholders since January 26, 2015. On that date, the Court of Appeal of Antwerp in *United Video Properties v. Telenet* referred some preliminary questions to the Court of Justice of the European Union (CJEU) regarding the (in)compatibility of Belgium's system of capped recovery of lawyer fees with article 14 of the IP Enforcement Directive. This article provides for the recovery of reasonable and proportionate legal and other costs by the party prevailing in an IP case.

Recovering lawyer fees in Belgian litigation, in particular when it relates to intellectual property (IP), is an old sore. Many assumed that it would be cured in 2007 through the implementation of Directive 2004/48/EG of 29 April 2004 on the enforcement of intellectual property rights, more particularly of its article 14. This article obligates Belgium as an EU-member state to "*ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.*" But that same year the Belgian Law on the Recovery of Lawyer Fees (LRLF) threw a wrench in the works of Belgian IP litigators. The LRLF provides for a "*fixed reimbursement*" for lawyer costs and fees. The LRLF more specifically established a horizontal system for all possible types of litigation, including IP litigation. An occasionally updated Royal Decree sets out the fixed compensation tariffs, the amount of which depends on the amount of damages claimed in the proceedings in question.

Since the fixed compensation tariffs are low, particularly when compared to the average budget required for IP litigation, the application of the LRLF virtually never results in a reasonable and proportionate reimbursement of the legal costs incurred by the successful party. Not surprisingly, this issue has been discussed several times before the competent Belgian IP courts. The few judges that have specifically ruled on the issue have always refused to establish that the Belgian legislator made a mistake in 2007. Different reasons were invoked, among others that:

- the actual lawyer costs had to be recovered as part of the damage suffered by the successful party,
- the correct implementation of the Enforcement Directive would result from the fact that the LRLF allows the court to increase the amount of the reimbursement up to the double of the base amount,
- a preferential treatment of IP-litigation would constitute a discrimination with respect to other types of litigation, and
- a judge cannot rule *contra legem* and therefore has no other option but to respect the amounts imposed by the LRLF.

Obviously the foregoing did not satisfy parties that anticipated winning their IP-proceedings in Belgium. This was particularly the case in patent proceedings. It is therefore no surprise that several of these parties requested the competent IP courts to refer the issue to CJEU. To our knowledge, with its ruling of January 26, 2015 the Court of Appeal of Antwerp is the first court in Belgium and even in Europe to have accepted to do so.

It remains to be seen how the CJEU will decide upon the referred questions. A decision is likely by the end of 2016. But if it rules that the Belgian system does not comply with European law, then a successful party in IP litigation in Belgium will likely recover much more of its lawyer fees than is currently the case. The same should also apply for IP litigation in other EU member states with a similar capped or otherwise "unreasonable" recovery system.

While awaiting the ruling of the CJEU, a party that is convinced that it will prevail in Belgian IP-litigation will for now have no other option but to claim the maximum (doubled) indemnity under the LRLF. A reservation can then be made for the reasonable and proportionate lawyer fees that would not be covered by this maximised indemnity. Consequently, the Belgian IP court in question can rule on all aspects of the case in an intermediate ruling and suspend its decision regarding the recovery of the balance of the claimed lawyer fees.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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